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Supreme Court, U.S.
FILED

98 189 JUL 23 1998

No. OFFICE OF THE CLERK

# In the Supreme Court

OF THE

# United States

OCTOBER TERM, 1998

STÉPHANE BOURCIER DE CARBON;
SOCIÉTÉ CIVILE DE GESTION DES ACTIONS DE CARBON;
*Petitioners*

vs.

GENERAL MOTORS CORPORATION, et al.
*Respondents*

**Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit**

## PETITION FOR WRIT OF CERTIORARI

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## QUESTIONS PRESENTED

1. Whether a district court's final judgment of dismissal is an appealable order under 28 U.S.C. § 1291 when the basis for dismissal is that the claims must be arbitrated?

2. Whether the Federal Arbitration Act effects a partial repeal of 28 U.S.C. § 1291 by prohibiting appeal of some final judgments of district courts when they are based upon the holding that petitioners' claims must be arbitrated?

## PARTIES

Petitioners Stéphane Bourcier de Carbon and Société Civile de Gestion des Actions de Carbon[1] (the "Holding Company") were Plaintiffs-Appellants before the Court of Appeals. Respondents General Motors ("GM") and its subsidiary Delphi Overseas Corporation ("DPOC") were Defendants-Appellees before the Court of Appeals. When petitioners commenced their derivative action in the District Court on behalf of Société Française des Amortisseurs de Carbon, S.A. (the "De Carbon Company" or "De Carbon"), petitioners[2] owned 40% of De Carbon and Respondents (through DPOC) owned 60% of De Carbon.

Both petitioner Holding Company and De Carbon are French corporations based in France and petitioner Stéphane Bourcier de Carbon is a French citizen residing in France. Respondents are both United States corporations based in the United States.

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[1] Petitioner Société Civile de Gestion des Actions de Carbon does not have any parent companies, subsidiaries or affiliates that have issued shares to the public.

[2] Stéphane Bourcier de Carbon is a shareholder of De Carbon, through his father's estate, and of the Holding Company.

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## I. OPINIONS BELOW

The opinion of the Court of Appeals (A19)[3] is unreported. The opinions of the District Court (A1 – A18) are unreported.

## II. BASIS FOR JURISDICTION IN THIS COURT

The Ninth Circuit entered judgment (A19) on April 24, 1998. This Court has jurisdiction under 28 U.S.C. § 1254(1). This petition for writ of certiorari is timely filed. S.Ct. Rule 13.1.

## III. STATUTES AND RULES

28 U.S.C. § 1291. Final decisions of district courts

The courts of appeals (other than the United States Court of Appeals for the Federal Circuit) shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court. The jurisdiction of the United States Court of Appeals for the Federal Circuit shall be limited to the jurisdiction described in sections 1292(c) and (d) and 1295 of this title.

9 U.S.C. § 3. Stay of proceedings where issue therein referable to arbitration

If any suit or proceeding be brought in any of the courts of the United States upon any issue referable to arbitration under an agreement in writing for such arbitration, the court in which such suit is pending, upon being satisfied that the

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[3]Citations to the Appendix pages attached to this petition are abbreviated as "A" followed by the appropriate page numbers.

issue involved in such suit or proceeding is referable to arbitration under such an agreement, shall on application of one of the parties stay the trial of the action until such arbitration has been had in accordance with the terms of the agreement, providing the applicant for the stay is not in default in proceeding with such arbitration.

9 U.S.C. § 4. Failure to arbitrate under agreement; petition to United States court having jurisdiction for order to compel arbitration; notice and service thereof; hearing and determination

A party aggrieved by the alleged failure, neglect, or refusal of another to arbitrate under a written agreement for arbitration may petition any United States district court which, save for such agreement, would have jurisdiction under Title 28, in a civil action or in admiralty of the subject matter of a suit arising out of the controversy between the parties, for an order directing that such arbitration proceed in the manner provided for in such agreement. Five days' notice in writing of such application shall be served upon the party in default. Service thereof shall be made in the manner provided by the Federal Rules of Civil Procedure. The court shall hear the parties, and upon being satisfied that the making of the agreement for arbitration or the failure to comply therewith is not in issue, the court shall make an order directing the parties to proceed to arbitration in accordance with the terms of the agreement. The hearing and proceedings, under such agreement, shall be within the district in which the petition for an order directing such arbitration is filed. If the making of the arbitration agreement or the failure, neglect, or refusal to perform the same be in issue, the court shall proceed summarily to the trial thereof. If no jury trial be demanded by the party alleged to be in default, or if the matter in dispute is within admiralty jurisdiction, the court shall hear and determine such issue.

Where such an issue is raised, the party alleged to be in default may, except in cases of admiralty, on or before the return day of the notice of application, demand a jury trial of such issue, and upon such demand the court shall make an order referring the issue or issues to a jury in the manner provided by the Federal Rules of Civil Procedure, or may specially call a jury for that purpose. If the jury find that no agreement in writing for arbitration was made or that there is no default in proceeding thereunder, the proceeding shall be dismissed. If the jury find that an agreement for arbitration was made in writing and that there is a default in proceeding thereunder, the court shall make an order summarily directing the parties to proceed with the arbitration in accordance with the terms thereof.

9 U.S.C. § 16. Appeals

(a) An appeal may be taken from —

(1) an order —

(A) refusing a stay of any action under section 3 of this title,

(B) denying a petition under section 4 of this title to order arbitration to proceed,

(C) denying an application under section 206 of this title to compel arbitration,

(D) confirming or denying confirmation of an award or partial award, or

(E) modifying, correcting, or vacating an award;

(2) an interlocutory order granting, continuing, or modifying an injunction against an arbitration that is subject to this title; or

(3) a final decision with respect to an arbitration that is subject to this title.

(b) Except as otherwise provided in section 1292(b) of title 28, an appeal may not be taken from an interlocutory order —

(1) granting a stay of any action under section 3 of this title;

(2) directing arbitration to proceed under section 4 of this title;

(3) compelling arbitration under section 206 of this title; or

(4) refusing to enjoin an arbitration that is subject to this title.

## IV. STATEMENT OF THE CASE

### A. INTRODUCTION

Several of the Circuits are irreconcilably split (4 to 3) on the question of whether a district court's final judgment of dismissal is an appealable order under 28 U.S.C. § 1291 when the basis for dismissal is that plaintiffs' claims must be arbitrated. The Third, Sixth and Tenth Circuits hold that such dismissals present appealable final judgments, *see, e.g., Armijo v. Prudential Ins. Co. of Am.*,72 F.3d 793 (10th Cir. 1995); *Arnold v. Arnold Corp.-Printed Communications for Bus.*, 920 F.2d 1269, 1274-75 (6th Cir. 1990); and *Nationwide Insurance Co. v. Patterson*, 953 F.2d 44, 46 (3d Cir. 1991), whereas the Fifth, Seventh, Eighth and Ninth Circuits hold they lack jurisdiction over appeals from most orders of dismissal in deference to arbitration even if the order completely ends the district court litigation. *See, e.g., Altman Nursing v. Clay Capital Corp.*, 84 F.3d 769, 771 (5th Cir. 1996); *Napleton v. General Motors Corp.*, 138 F.3d 1209, 1212 (7th Cir. 1998); *Gammaro v. Thorp Consumer Discount Co.*, 15 F.3d 93, 95 (8th Cir. 1994); and

*McCarthy v. Providential Corp.*, 122 F.3d 1242, 1244, 1245 (9th Cir. 1997).

This case thus presents a clear and irreconcilable conflict among the Circuits on important questions of federal appellate jurisdiction and procedure and the interrelationship between two statutes. Here, the court below merely cited its own recent split decision in *McCarthy* (petition for writ of certiorari filed May 26, 1998) to reiterate that a final judgment compelling arbitration was not appealable under 28 U.S.C. § 1291 because § 16(a)(3) and (b)(2) of the Federal Arbitration Act ("FAA") — which preserves appeals of final decisions — purportedly renders the judgment below interlocutory and nonappealable.

## B. THE FACTS NECESSITATING PETITIONERS' COMMENCEMENT OF THEIR ACTION IN THE DISTRICT COURT

De Carbon invented and patented a monotube shock absorber designed for high performance vehicles which is generally recognized as the best in the world. Petitioners commenced a shareholder derivative action on behalf of De Carbon, pleading both direct and derivative claims arising from violations of United States racketeering, antitrust and trademark laws as well as state law claims of fraud, breach of fiduciary duties, theft of trade secrets, conversion and conspiracy. More particularly: petitioners alleged that respondents acquired De Carbon's patented technology and related assets by fraudulently representing to the De Carbon family that defendants' acquisition of control of De Carbon was for the purpose of giving the De Carbons access to the United States market. These false representations were made by GM executives from their United States offices by means of U.S. mail and wire in violation of 18 U.S.C. §§ 1341 and 1343. Petitioners further alleged that, once respondents acquired control of De Carbon, they stole De

Carbon's technology as part of their plan to monopolize the United States market — exporting all of De Carbon's patented technology, knowhow and trade secrets from Normandy, France to GM's facilities in the United States. De Carbon's stolen technology was then used by respondents to build a plant in Dayton, Ohio for the manufacture of counterfeit shock absorbers which respondents made, used, advertised and sold in the United States market in violation of the Lanham Act.

In February 1995, petitioners sought to have the French courts initiate an investigation of respondents' misconduct. Respondents opposed the investigation, claiming that petitioners' allegations were subject to arbitration.[4] That claim was ultimately rejected by three French courts — the Commercial Court of Louviers in March 1995, the Court of Appeals of Rouen in July 1995 and the Supreme Court of France in October 1997 — on the grounds that petitioners' claims were not arbitrable. Because of these numerous French court rulings and because respondents' tortious acts were committed by United States corporations in the United States for the purpose of harming United States commerce, petitioners were compelled to commence this action in a United States court.

## C. THE DISTRICT COURT

Petitioners commenced their action in the District Court for the Northern District of California on December 30, 1996. To preserve their derivative standing under Federal Rule of Civil Procedure 23, petitioners moved for a preliminary injunction on February 7, 1997 to prevent respondents from consummating their plan to acquire the Holding Com-

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[4]The agreements by which DPOC acquired 60% of De Carbon's stock provided the agreements would be governed by French law and that any disputes concerning them or their breach were subject to arbitration in Paris, France.

pany's remaining 40% shareholder interest in De Carbon pending trial. Respondents countered with, *inter alia*, a motion to dismiss all of petitioners' claims, asserting that petitioners' claims were subject to arbitration pursuant to the FAA, 9 U.S.C. §§ 1-16 and §§ 201-208.

Petitioners responded that both French law (chosen by the parties to govern construction of their contract) and United States law precluded French arbitration of U.S. tort law claims (i.e., the Sherman Act, the Lanham Act and RICO) between nonparties to the contract (i.e., GM and De Carbon). On June 10, 1997, the District Court nonetheless entered a dismissal with prejudice on all of petitioners' claims, declaring that "all of plaintiffs' claims against all defendants" were arbitrable. *See* A9. This dismissal was, in legal effect, a final judgment[5] that disposed of all claims of all parties. On June 24, 1997, petitioners filed an expedited motion to alter or amend the judgment pursuant to Federal Rule of Civil Procedure 59(e). The District Court expressly treated it as a motion for reconsideration of a final judgment pursuant to Federal Rule of Civil Procedure 60, declaring "FRCP 60(b) governs the reconsideration of *final* orders" (A16; emphasis added), and denied petitioners' motion on July 3, 1997. To preserve their standing on appeal, petitioners requested the court to enjoin respondents' acquisition of just five shares of De Carbon stock pending appeal. Although denying petitioners' request, the District Court conditioned its denial upon a stipulation by the parties that would ensure the preservation of petitioners' standing "pending appeal of its Dismissal Order." Clearly, the Dis-

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[5]Federal Rule of Civil Procedure 54(a) provides that " 'judgment' as used in these rules includes a decree and any order from which an appeal lies." Accordingly, an order — such as an order of dismissal — may be a judgment. *See also Bankers Trust Co. v. Mallis*, 435 U.S. 381, 384 fn. 4, 98 S.Ct. 1117, 1120 fn. 4 (1978).

trict Court meant its judgment of dismissal with prejudice to be "final" and appealable.[6]

## D. THE COURT OF APPEALS

Petitioners appealed the District Court's judgment to the Ninth Circuit. They contended their claims were not subject to arbitration because (1) the arbitration clause was not applicable to De Carbon's claims against GM since neither was a party to the arbitration clause; (2) the arbitration clause was not applicable to petitioners' United States tort law claims; and (3) enforcement of arbitration under these circumstances would result in a forfeiture of petitioners' Sherman Act, RICO and Lanham Act claims — a result which this Court said it "would have little hesitation in condemning" as "against public policy." *Mitsubishi Motors Corp. v. Soler Chrysler & Plymouth,* 473 U.S. 614, 637 fn.19, 105 S.Ct. 3346, 3359 fn.19 (1985); *see also, Vimar Sugeros y. Reasegueros, S.A. v. M/V Sky Reefer,* 515 U.S. 528, 540, 115 S. Ct. 2322, 2330 (1995); *The Bremen v. Zapata Offshore Co.,* 401 U.S. 1, 15, 92 S. Ct. 1907, 1916 (1972).

*After* petitioners filed their notice of appeal from the District Court's judgment, the Ninth Circuit issued its split decision in *McCarthy.* In a case of first impression for that Circuit, the Court of Appeals there held that a final order dismissing an action in favor of arbitration is "interlocutory" under 9 U.S.C. § 16(a)(3) and (b)(2) whenever the arbitration issue is "embedded" in a "substantive" action. On April 6, 1998, respondents filed a motion to dismiss petition-

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[6]This is so even though the District Court's judgment was not set forth on a separate document, as prescribed by Federal Rule of Civil Procedure 58. It is now well established that a judgment set forth on a separate document is not a prerequisite to appellate jurisdiction. *See Bankers Trust Co. v. Mallis,* 435 U.S. 381, 384, 387-88, 98 S.Ct. 1119-20, 1121 (1978); *see also U.S. v. Nordbrock,* 38 F.3d 440, 442 fn.1 (9th Cir. 1994).

ers' appeal based on *McCarthy*. On April 13, 1998, petitioners filed their opposition, stating the District Court's judgment of dismissal of all claims with prejudice was final and appealable under 28 U.S.C. § 1291 and 9 U.S.C. § 16. On April 24, 1998, a motions panel of the Court of Appeals — which included the *McCarthy* panel majority — cited themselves in dismissing petitioners' appeal here: "Appellees' motion to dismiss this appeal for lack of jurisdiction is granted. *See* 9 U.S.C. § 16(b)(2); *McCarthy v. Providential Corp.*, 122 F.3d 1242, 1244-45 (9th Cir. 1997)". A19.

## V. REASONS WRIT SHOULD BE GRANTED

A petition for writ of certiorari was filed in *McCarthy* in May 1998. Because the decision of the Ninth Circuit here was based solely on *McCarthy* and two of the judges here also rendered the majority opinion in *McCarthy*, this petition is at least as needful of review as *McCarthy* is.[7] Both the decision below and *McCarthy* warrant this Court's review because several courts of appeal are completely at odds on an important question of federal appellate jurisdiction and procedure: whether a complete dismissal of plaintiff's action on the ground that it should be arbitrated is an appealable order. Stated differently, the courts of appeal are divided over the interplay between two frequently invoked federal statutes, i.e., whether 9 U.S.C. § 16(a)(3) and (b)(2) has effected an implied partial repeal of the grant of appellate jurisdiction over final judgments given by 28 U.S.C. § 1291.

Section 1291 provides that federal "courts of appeal . . . *shall have jurisdiction of appeals from all final decisions* of the district courts of the United States." 28 U.S.C. § 1291 (emphasis added). A "final decision" is one

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[7] At a minimum, if certiorari is granted in *McCarthy*, petitioners request that a decision here be held over until a final decision is reached in *McCarthy*.

that "ends the litigation on the merits and leaves nothing for the court to do but execute the judgment." *Catlin v. United States,* 324 U.S. 229, 233, S.Ct. 631, 673 (1945). An order of involuntary dismissal of an action is considered final and thus immediately appealable. *See United States v. Wallace & Tiernan Co.,* 336 U.S. 793, 794 fn.1, 69 S.Ct. 824, 825 fn.1 (1949); *Montes v. United States,* 37 F.3d 1347, 1350 (9th Cir. 1994). Here, the District Court held that all of plaintiffs' claims against all defendants were arbitrable and therefore dismissed the entire action (*see* A1) — not merely the complaint — on that basis. Indeed, plaintiffs' claims were "dismissed with prejudice." A9. That complete relief was precisely what respondents sought.

The FAA also allows appeals from "final decisions": Section 16(a)(3) provides for appeals from "a final decision with respect to an arbitration that is subject to this title," 9 U.S.C. § 16(a)(3), while Section 16(b)(2) forbids appeals from "interlocutory" orders. 9 U.S.C. § 16(b)(2). To be consistent with established doctrines of appealability under 28 U.S.C. § 1291, a dismissal with prejudice on the ground of arbitrability, such as that entered here, should be considered a final decision under the Federal Arbitration Act.[8] Such a dismissal, in contrast to a stay, operates "as an adjudication on the merits" (*see* Federal Rule of Civil Procedure 41(b)), leaving nothing further for the court to do. The Third, Tenth, and Sixth Circuits have interpreted the FAA in this way — in harmony with § 1291. Yet the Fifth, Seventh, Eighth and Ninth Circuits apparently believe that § 16(b)(2) of the FAA partially overrides § 1291.

The questions presented here pose important considerations of judicial certainty, the administration of justice, the

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[8] Whether this case properly involves an arbitration subject to the Federal Arbitration Act is one of the issues raised by the appeal that was dismissed by the Ninth Circuit.

proper accommodation of two federal statutes, the First Amendment right to petition for redress, due process, and the right to seek effective and timely appellate review of erroneous decisions dismissing claims. The division between the Fifth, Seventh, Eighth and Ninth Circuits on the one hand and the Third, Sixth and Tenth Circuits on the other is firmly entrenched and cannot be resolved without direction by this Court — the "ultimate expositor of the meaning of the federal constitution and statutes."[9]

## A. THE COURTS OF APPEALS ARE DEEPLY SPLIT

As noted above, the Third, Sixth and Tenth Circuits hold that final dismissal of an action in deference to arbitration is appealable under 28 U.S.C. § 1291. In *Arnold,* 920 F.2d 1269, the Sixth Circuit held that it had jurisdiction to hear an appeal of a district court's order directing the parties to proceed to arbitration, even though the arbitrability issue was not independent of the securities violations alleged in the underlying suit. *Id.* at 1275-76. The court offered two justifications for the result: First, the district court's order was not "interlocutory," having dismissed the complaint "in its entirety" while denying defendants' motion to stay the action pending arbitration as "moot." *Id.* at 1275. Second, the court found the FAA's legislative history "dispositive" as the Senate Committee on the Judiciary had explicitly stated when amending the Act in 1988, "Appeal can be taken from final judgments, including a final judgment in an action to compel arbitration . . . or a *final judgment dismissing an action in deference to arbitration.*" *Id.* at 1274-75

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[9] Arthur D. Hellman, *The Supreme Court, The National Law, And The Selection Of Cases For The Plenary Docket,* 44 U. Pitt. L. Rev. 521, 522 (1983).

(emphasis in original).[10] As the Senate Committee specifically observed, these appeals "preserve the general policy that appeal should be available when there is nothing left to be done in the district court."[11]

The Tenth Circuit similarly held that it had jurisdiction under Section 1291 to hear an appeal of a final order compelling arbitration in *Armijo,* 72 F.3d at 797. Again, the decision turned on the fact that the district court compelled arbitration and *dismissed* the action rather than *ordering a stay* of the proceedings. *Id.* Hence the district court's order granting defendants' motions was "clearly a final order, permitting" the Tenth Circuit to exercise jurisdiction. *Id.*

Four other Circuits have refused to acknowledge the differences between stays and dismissals in the context of orders compelling arbitration.[12] The Ninth Circuit followed the Fifth and Eighth Circuits in holding that even a final dismissal and entry of judgment in favor of arbitration is not "final" under Section 1291 unless the motion to compel arbitration is the only claim in this case. The decision of the panel majority in *McCarthy* turned on its belief that, when the arbitration issue is "embedded", all orders compelling arbitration — even patently final orders like that entered here — are deemed "interlocutory." *McCarthy,* 122 F.3d at 1244.

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[10]Quoting *Committee on the Judiciary, Section by Section Analysis on S1482,* 100th Congress, 2d Sess., 134 Cong. Rec. S16284, Oct. 14, 1988 (emphasis added).

[11]*Id.* (quoting *Committee on the Judiciary, supra* at S16309).

[12]The difference between a stay and a dismissal is significant. A dismissal requires the party who seeks the aid of the court to file a new action, exposing the party to statute of limitations dangers and other procedural hazards. *Carnation Co. v. Pacific Westbound Conf.,* 383 U.S. 213, 222-23, 865 S.Ct. 781, 787 (1966).

Part of the confusion among the Circuits over this question stems from a perceived distinction that has somehow evolved within some Circuits between "independent" and "embedded" motions to compel arbitration. "Independent" proceedings have been characterized as lawsuits in which the sole claim before the court is the arbitrability of the dispute. *See, e.g., McDermott Int'l v. Underwriters at Lloyds,* 981 F.2d 744, 747 (5th Cir. 1993). Some courts regard a decision to compel arbitration in an "independent" proceeding as reviewable on appeal under 9 U.S.C. § 16(a)(3). *Id.* "Embedded" proceedings have been characterized as those actions in which a dispute over arbitrability is but part of a larger dispute before the court. *See, e.g., Filanto, S.P.A. v. Chilewich Int'l Corp.,* 984 F.2d 58, 60 (2d Cir. 1993). But the FAA does not speak of either "embedded" or "independent" proceedings, nor has this Court ever spoken of such a dichotomy. The distinction has gradually crept into the decisions of a few lower courts without much analysis. A decision *not* to compel arbitration in an "embedded" situation is understandably not, in and of itself, appealable.[13] But some courts have extended this principle much further, holding that an order *compelling* arbitration in an "embedded" proceeding is also not appealable even if it includes a final order of dismissal with prejudice. *See, e.g. Altman Nursing,* 84 F.3d at 772; and *Napleton,* 138 F.3d at 120.[14] Other courts disagree, relying on Section 1291.[15]

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[13] *See, e.g., Gammaro,* 15 F.3d at 95.

[14] For a thoughtful criticism of this confusing distinction, see Circuit Judge Wood's dissent in *Napleton* at p. 1216 and Circuit Judge Pregerson's dissent in *McCarthy* at pp. 1246-49. Circuit Judges Posner, Easterbrook, Cummings, and Rovner voted with Judge Wood for a rehearing *en banc* of the split decision in *Napleton,* suggesting they also were troubled by this artificial basis for denying appeals from dismissals on arbitration grounds.

[15] *See Armijo,* 72 F.3d at 797; *Arnold,* 920 F.2d at 1276.

The two-judge majority in *McCarthy* (and consequently the same judges' ruling here) followed *Gammaro,* 15 F.3d at 95-97, in which the Eighth Circuit held that it lacked jurisdiction over an appeal from what it called an interlocutory order compelling arbitration. *Id.* at 94. The Eighth Circuit refused to consider plaintiff's separate argument that jurisdiction existed under 28 U.S.C. § 1291, explaining that "our construction of 9 U.S.C. § 16 precludes that argument." *Id.* at 96. In effect, the Eighth Circuit held the Federal Arbitration Act operates as a partial repeal of 28 U.S.C. § 1291, even though Section 1291 states that courts of appeals "*shall* have jurisdiction" over *"all"* final decisions of the district courts of the United States. 28 U.S.C. § 1291 (emphasis added). The Eighth Circuit's holding, of course, contravenes the maxim that "legislative repeals by implication will not be recognized, insofar as two statutes are capable of coexistence, absent a clearly expressed congressional intention to the contrary." *Astoria Fed. Sav. & Loan Ass'n v. Solimino,* 501 U.S. 104, 109, 111 S.Ct. 2166, 2170 (1991).

The Fifth Circuit in *Altman Nursing* likewise rejected *Arnold* and followed *Gammaro. See Altman Nursing,* 84 F.3d at 771 (criticizing *Arnold*). Like *Gammaro,* the Altman Nursing panel was not swayed by the fact that the underlying order completely ended the litigation and therefore constituted an appealable final order: "We disagree .... An order involving an embedded proceeding is *always* an interlocutory order; an order involving an independent claim is *always* final."[16] *Id.* (emphasis added). There is plainly an irreconcilable division among the circuits.

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[16]The other decisions cited by the majority in *McCarthy* do not reach the question presented, as they do not involve dismissals or judgments. For example, in *American Cas. Co. v. L-J, Inc.*, 35 F.3d 133 (4th Cir. 1994), the Fourth Circuit noted that the district court's order was interlocutory and nonappealable because it had "*stayed* the litigation."

The decision below and in *McCarthy* (as well as those of the Fifth, Seventh and Eighth Circuits) appear to be inconsistent with this Court's jurisprudence regarding the plain meaning of Section 1291. This Court recently reaffirmed the plain and simple meaning of finality under that statute in *United States v. Jose,* 519 U.S. 54, 117 S. Ct. 463 (1996), when it reversed the Ninth Circuit's dismissal of an appeal for lack of jurisdiction and held that the Ninth Circuit had improperly injected a different concept (ripeness) into its jurisdictional analysis. As this Court stated, "[f]inality, not ripeness, is the doctrine governing appeals from district court." *Id.* at 465.

Here, as in *McCarthy,* the Ninth Circuit has ignored the plain statutory text of both Section 1291 and the FAA. If Congress intended the FAA to modify the meaning of "final decisions" under Section 1291, it would have said so. *See Central Bank, N.A. v. First Interstate Bank, N.A.,* 511 U.S. 164, 177, S.Ct. 1439, 1448 (1994) (Congress knows how to place express language in statutory text).

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*Id.* at 138 (emphasis added). Another Fourth Circuit decision, *Stedor Enter., Ltd. v. Armtex, Inc.,* 947 F.2d 727 (4th Cir. 1991), appears to hold that the FAA does not undermine Section 1291 appellate jurisdiction over final orders because Congress did not define the terms "interlocutory" or "final" in the FAA. *Stedor* concludes that Section 16(a)(3) of the Act requires "courts to *continue* the prior, settled usage" of the term "final" decision; i.e., "'one which ends the litigation on the merits and leaves nothing for the court to do but execute the judgment.'" *Stedor,* 947 F.2d at 731 (quoting *Catlin v. United States,* 324 U.S. 229, 233, 65 S.Ct. 631, 633 (1945)) (emphasis added). Similarly, *Filanto* held an order compelling arbitration nonappealable because the district court *specifically* "declined to dismiss the complaint." 984 F.2d at 61. In *Filanto* the Second Circuit acknowledged that it was "arguable" that, had the complaint been dismissed with finality, "an appeal would be immediately available." *Id.* at 61 n.3.

## B. THE QUESTIONS PRESENTED ARE IMPORTANT TO THE ADMINISTRATION OF JUSTICE AND TO THE RIGHTS OF PLAINTIFFS TO SEEK EFFECTIVE AND TIMELY REVIEW OF ERRONEOUS DISMISSALS OF COMPLAINTS

The Court has granted certiorari when an intercircuit conflict exists and *"a considerable number of suits are pending in the lower courts which will turn on [its] resolution." See Massachusetts Trustees of Eastern Gas & Fuel Assoc. v. United States,* 377 U.S. 235, 237, 84 S.Ct. 1236, 1239 (1964) (emphasis added). That rationale warrants certiorari here. It is well known that arbitration clauses are becoming more prevalent in contracts of all types.[17] As a direct result, disputes over arbitrability also continue to grow. While arbitration disputes might occasionally be presented on a petition to compel arbitration under 9 U.S.C. § 4 *et seq.,* (hence "independent") , there is every reason to believe they are comparatively rare and that arbitration is virtually always "embedded" as a defense to a previously instituted court action. Increasingly, civil actions are thus met with motions to dismiss or stay based upon an asserted obligation to arbitrate, with resulting confrontation on that and other issues. Indeed, hundreds of these disagreements arise each year, and several have reached this Court in recent years.[18]

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[17] *See, e.g.,* Harold Brown, *Alternative Dispute Resolution: Realities and Remedies,* 30 Suffolk U. L. Rev. 743, 745 (1997) (noting increasingly common arbitration clauses in agreements involving, *inter alia,* stockbrokers, banks, franchisors, and employer/employee relationships).

[18] *See, e.g., First Options v. Kaplan,* 514 U.S. 938, 115 S. Ct. 1920 (1995); *Gilmer v. Interstate/Johnson Lane Corp.,* 500 U.S. 20, 111 S.Ct. 1647 (1991); *Volt Information Service v. Board of Trustees,* 489 U.S. 468, 109 S.Ct. 1248 (1989).

The persistence of this confusion regarding the appealability of a judgment of dismissal on arbitration grounds will, until resolved by this Court, only serve to thwart the policy in favor of arbitration by discouraging parties from including arbitration clauses in their contracts. For example: if a court action is wrongly dismissed on arbitration grounds and plaintiff is unable to appeal and yet the arbitration panel subsequently holds the dispute is not arbitrable (as will certainly occur here), what then? Since there will be no action pending in the District Court or the Court of Appeals, where does plaintiff seek review of the arbitrator's disclaimer of jurisdiction? Does the statute of limitations run on plaintiffs' claim in the interim? *See, e.g., Carnation Co. Pacific Westbound Conf.*, 383 U.S. 213, 222-223, 86 S.Ct. 781, 787 (1966). (For other problems resulting from this appellate confusion, see discussion in *Napleton,* 138 F.3d at 1217.) There is no good reason why anyone — faced with such uncertainty and delay over appellate review concerning the proper forum to hear his claim — should waive his First and Seventh Amendment rights to a jury trial of his grievance in favor of a contract requiring arbitration. Only this Court, with its unique responsibility for overseeing the lower federal courts, can resolve this burgeoning conflict among numerous Circuits over the interpretation of two federal statutes without compromising one's Constitutional rights of petition and due process. Harmonization of the statutes and unification of practice in the federal courts, so as to ensure a prompt and fair hearing to litigants, is needed.

## VI. CONCLUSION

For the reasons set forth above, the petition for writ of certiorari should be granted.

Dated: July 21, 1998 Respectfully submitted,

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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF
CALIFORNIA

STEPHANE BOURCIER DE CARBON, et al.,
*Plaintiffs,*

v.

GENERAL MOTORS CORPORATION, et al.,
*Defendants.*

(Entered June 10, 1997)

**ORDER OF DISMISSAL**

Filed June 9, 1997
Richard W. Wieking
Clerk, U.S. District Court
Northern District of California

On April 4, 1997, the Court heard argument on defendants' motions to dismiss and plaintiffs' motion for a preliminary injunction. Having considered the arguments of counsel and the papers submitted, the Court hereby dismisses this action and denies plaintiffs' motion for preliminary injunction.

## BACKGROUND

Plaintiffs Stephane Bourcier de Carbon and the Societe Civile de Gestion des Actions de Carbon (the "Holding Company") are the minority shareholders of the Societe Francaise des Amortisseurs de Carbon S.A. (the "De Carbon Company"), a French corporation which manufactures monotube shock absorbers for use in automobile suspension systems. In 1989, General Motors Corporation ("GM"),

through its wholly owned subsidiary Delphi Overseas Corporation ("DPOC"), acquired 60% of the stock of the De Carbon Company. The remaining 40% of the company's stock is still owned by the De Carbon family[1] via the Holding Company.

The acquisition at issue was effected by a series of agreements signed by DPOC, on the one hand, and the individual De Carbon family members on the other, in late 1987 and early 1988. The agreements include a Pre-acquisition Agreement, Share Acquisition and Subscription Agreement, Shareholders Agreement, and Supplemental Shareholders Agreement (collectively the "Stock Transfer Agreements").

Significant disputes have arisen between the De Carbon family members, DPOC and the GM defendants, relating in large part to the value to be assigned to the remaining 40% of the De Carbon Company stock still held by the individual family members. Both litigation in the French commercial courts, concerning appointment of an evaluator for the shares, and in various International Chamber of Commerce ("ICC") arbitration proceedings in Paris, France, have already taken place.

Plaintiffs filed this action in the Northern District of California [2]against GM, Delco Chassis Division of GM,

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[1] The members of the De Carbon family involved in this matter are Christian Bourcier de Carbon, the now-deceased founder of the company, and his sons Axel Bourcier de Carbon, Stephane Bourcier de Carbon and Roland Bourcier de Carbon. The individual family members were parties to the written stock transfer agreements in dispute.

[2]The complaint alleges that venue in this district is proper because defendants "transact business" here. The General Motors defendants trasact business virtually everywhere in the United States. Upon inquiry at oral argument, counsel for plaintiffs indicated that there was no particular case-related factual connection to the Northern District of California.

Delco Chassis Systems Division of GM, DPOC, and the De Carbon Company itself on December 30, 1996. The complaint alleges both direct and derivative claims of trademark infringement and antitrust and RICO violations, as well as California state law claims including breach of fiduciary duty, conversion, theft of trade secrets and fraud.

Presently before the Court are plaintiffs' motion for a preliminary injunction, seeking to enjoin defendants from proceeding with the final acquisition of the remaining shares of stock in the De Carbon Company in accordance with the Stock Transfer Agreements; and defendants' four separate motions to dismiss, based on: 1) the Federal Arbitration Act; 2) forum non conveniens; 3) lack of personal jurisdiction over the nominal defendant De Carbon Company; and 4) failure to join an indispensable party.

## DISCUSSION

### A. *Federal Arbitration Act.*

Defendants seek dismissal of plaintiffs' individual (direct) claims pursuant to the Federal Arbitration Act, 9 U.S.C. §§ 1-16, 201-208. Defendants contend that all of plaintiffs' claims fall within the contractual arbitration clauses which are part of the Stock Transfer Agreements signed by plaintiffs and DPOC, and that these disputes must be submitted to an International Chamber of Commerce (ICC) arbitration in Paris, France pursuant to the Agreements.

Plaintiffs contend that most of their claims, including the RICO, antitrust, trademark infringement, false advertising and conversion claims, are not arbitrable because (1) of all the defendants named, only defendant DPOC was a party to the agreements containing arbitration clauses; and (2) the claims are unrelated to the Stock Transfer Agreements and thus are not within the scope of arbitration clauses.

The relevant language of the Stock Transfer Agreements reads:

> 23. *Governing Law and Jurisdiction*
>
> 23.1 This Agreement and all attachments and Appendices shall be governed by the laws of France.
>
> 23.2 In the event of any dispute or difference arising out of or relating to this Agreement or the breach thereof . . . the disputes or differences shall be finally settled under the Rules of Conciliation and Arbitration of the International Chamber of Commerce by three (3) arbitrators appointed in accordance with such rules. The site of arbitration shall be Paris (France).

(Lecarpentier Decl., Exh. B1, p. 16-17.) In light of this broad language, which appears in each of the four stock transfer agreements, defendants assert that all of the De Carbons' claims constitute "disputes or differences arising out of or relating to" the agreements or the breach thereof, and thus are within the scope of the arbitration clause.

The Federal Arbitration Act includes the Convention on the Recognition and Enforcement of Foreign Arbitral Awards. 9 U.S.C. § 201. This chapter of the Act codifies what is recognized as an "emphatic federal policy in favor of arbitral dispute resolution, [and] . . . that federal policy applies with special force in the field of international commerce." *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth,* 473 U.S. 614, 631 (1985); *Sherk v. Alberto-Culver Co.,* 417 U.S. 506, 518-19 (1974). The Supreme Court has also upheld the principle that "any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration." *Moses H. Cone Memorial Hospital v. Mercury Construction Corp.,* 460 U.S. 1, 24 (1983).

Following the language of the Convention, the First and Tenth Circuits have employed a four-part inquiry for deter-

mining whether litigants should be compelled to arbitrate a particular dispute under the Federal Arbitration Act:

> (1) is there an agreement in writing to arbitrate the subject of the dispute?
>
> (2) does the agreement provide for arbitration in the territory of the signatory of the Convention?
>
> (3) does the agreement arise out of a legal relationship whether contractual or not, which is considered as commercial?
>
> (4) is a party to the agreement not an American citizen, or does the commercial relationship have some reasonable relation with one or more foreign states?

*Riley v. Kingsley Underwriting Agencies Ltd.*, 969 F.2d 953, 959 (10th Cir. 1992), citing *Ledee v. Ceramiche Ragno*, 684 F.2d 184, 186-87 (1st Cir. 1982).

In the present case, there is (1) an agreement in writing between the parties which calls for arbitration of any dispute or difference arising out of or relating to the agreement; (2) the agreement provides for arbitration in France which is a signatory country to the Convention; (3) the legal relationship between the parties is commercial; and (4) French citizens are parties to the agreement.

Plaintiffs argue that the current dispute involves GM's theft of trade secrets, false advertising, antitrust violations, trademark infringement, etc., which are not "disputes or differences arising out of or relating to" the agreements or the breach thereof, and which have not yet been litigated in the French judicial and arbitral proceedings.

However, the transfer agreements include sections addressing trademark licenses and technology transfer agreements, and include covenants concerning acting in "good faith" and in the best interests of the De Carbon Company. Thus, plaintiffs' claims of trade secret violations and trade-

mark infringement relate directly to the terms of the Stock Transfer Agreements. In addition, plaintiffs' RICO claims allege an ongoing scheme to "raid" De Carbon Company of its assets, trade secrets, market shares, etc., all in alleged violation of defendants' duty of loyalty and good faith under the stock transfer agreements.

Language as expansive as that used in the present arbitration agreement has consistently been construed broadly by the Supreme Court. Such language has been construed to reach antitrust claims (*see Mitsubishi,* 473 U.S. at 636-37) and fraud claims (*see Prima Paint v. Flood & Conklin Manufacturing Co.,* 388 U.S. 395, 399-400 (1967)).

It is clear from the Stock Transfer Agreements that the individual plaintiffs and DPOC are obligated, as signatories to the Stock Transfer Agreements, to arbitrate any disputes related to the Agreements, and the Court finds that the claims alleged in this action by plaintiffs against DPOC arise out of or relate to the terms of the Stock Transfer Agreements and are therefore subject to arbitration pursuant to the arbitration clause of the Agreements and the Federal Arbitration Act.

Plaintiffs contend that even if the claims against DPOC were subject to arbitration, the claims against the other GM defendants named in this action are not arbitrable, because those other defendants were not signatories to the Stock Transfer Agreements. Plaintiffs further argue that the GM defendants are judicially estopped from asserting that the claims against them should be arbitrated, because GM's position during the French proceedings was that the GM defendants could not be compelled to arbitrate since they — unlike DPOC — were not parties to the Stock Transfer Agreements.

The GM defendants vigorously dispute this contention, arguing that the question of the GM defendants' participa-

tion in the ICC arbitration process has never previously come up and stating that they have never taken the position that they cannot properly be joined in an ICC arbitration proceeding under the Stock Transfer Agreements. The GM defendants argue that the prior French litigation, to which they resisted being joined because they were not signatories to the Stock Transfer Agreements, was not ICC arbitration at all, but rather was French commercial court litigation concerning the identity of the appropriate evaluator. This appears, from the record presented, to be correct.[3]

The controlling law in the Ninth Circuit on the issue of whether a parent company can be bound by a subsidiary's consent to an arbitration clause is found in *Manetti-Farrow, Inc. v. Gucci America, Inc.*, 858 F.2d 509 (9th Cir. 1988). In *Manetti-Farrow*, the court held that "a range of transaction participants, parties and non-parties, should benefit from and be subject to [arbitration clauses]." *Id.* at 614, n. 5. The court went on to hold that where the alleged conduct of the non-parties is so closely related to the contractual relationship, an arbitration clause can apply to a non-party parent company. *Id.*[4]

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[3]Counsel for the GM defendants stated on the record at oral argument that the GM defendants would participate in arbitration in the French forum should this Court decide to return this action to ICC arbitration in France.

[4]Plaintiffs urge the Court to adopt the holding of the Third Circuit in *Kaplan v. First Options of Chicago, Inc.*, 19 F.3d 1503 (3d Cir. 1994), *aff'd*, 115 S.Ct. 1920 (1995); and *Dayhoff, Inc. v. H.J. Heinz Co.*, 86 F.3d 1287 (3d Cir. 1996), *cert. denied*, 500 U.S. 953 (1996). In those cases, the Third Circuit held that a party which is not a signatory to the agreement containing an arbitration clause cannot be compelled to arbitrate pursuant to that agreement. *Dayhoff* at 1296. Plaintiffs contend that the holding in *Manetti-Farrow* is inconsistent with the Supreme Court's ruling affirming the outcome in *First Options*. However, the Court disagrees with plaintiffs' interpretation of the holding in *First Options* and follows the binding Ninth Circuit precedent on this issue.

Here, the alleged conduct of GM and its subsidiaries is sufficiently related to the contractual obligations between plaintiffs and DPOC to support a finding that the GM defendants are within the reach of the arbitration clause of the Stock Transfer Agreements.

Accordingly, the Court finds that plaintiffs' claims alleging actions by GM and its subsidiaries which were harmful to the interests of the De Carbon Company and its shareholders constitute a dispute which is related to the Stock Transfer Agreements. As such, the Court must, pursuant to the Federal Arbitration Act, dismiss plaintiffs' claims and compel plaintiffs to arbitrate the claims as previously agreed by the parties. *Mitsubishi,* 473 U.S. at 640.[5] This dismissal is conditioned upon the GM defendants' agreement, based on

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[5]Since this matter was briefed and argued, the Ninth Circuit decided *Govett American Endeavor Fund, Ltd. v. Trueger,* ____ F.3d ____, 97 CDOS 3187 (9th Cir. May 2, 1997). In letter briefs, the parties point to language in *Govett* which states that "a contract specifying the law of a foreign jurisdiction as the law controlling contractual duties cannot be used as a defense to claims of torts committed in violation of federal criminal statues" (referring to RICO) and that parties cannot "attempt by contract referring to foreign law to save from criminal or tort liability acts performed in the United States by citizens of the United States involving investments in companies in the United States." Plaintiff urges that *Govett* precludes reliance on French law in this case. Defendant responds that *Govett* does not apply here because this case involves acts in France involving an investment in a French company in France, and because this case involves a forum selection clause, not just a choice of law provision. More fundamentally, this case involves a mandatory arbitration provision, requiring that international arbitration proceedings be undertaken. To the extent that plaintiff's RICO claims are viable, because of *Govett* or otherwise, such claims are arbitrable. *Shearson/American Express, Inc. v. McMahon,* 107 S.Ct. 2332, 2345-6 (1987): "In sum, we find no basis for concluding that Congress intended to prevent enforcement of agreements to arbitrate RICO claims. [Plaintiffs] may effectively vindicate their RICO claim in an arbitral forum, and therefore there is no inherent conflict between arbitration and the purposes underlying § 1964(c)."

their representations to the Court, that they are subject to and will participate in ICC arbitration proceedings in France. In sum, on the issue of arbitration, the Court finds that all of plaintiffs' claims against all defendants are arbitrable, and finds that the GM defendants must participate in that arbitration process.

Accordingly, plaintiffs' claims against the GM defendants and DPOC are hereby DISMISSED WITH PREJUDICE.

B. *Personal Jurisdiction over De Carbon Company.*

Defendants further argue that this Court lacks jurisdiction over any derivative claims brought on behalf of the De Carbon Company, because, they contend, the De Carbon Company has insufficient contacts with this forum to justify the exercise of either general or specific jurisdiction over it by this Court.

1. *Legal Standard for Personal Jurisdiction.*

Federal courts have powers of personal jurisdiction as broad as the courts of the state in which they are located. *Omni Capital Int'l., Ltd. v. Rudolph Wolff & Co., Ltd.*, 484 U.S. 105-106 (1987); Schwarzer, Tashima & Wagstaffe, *California Practice Guide; Federal Civil Procedure Before Trial*, 3:23-24 (The Rutter Group 1997). The statutory basis for a California court's exercise of personal jurisdiction is California Code of Civil Procedure § 410.10:

> A court of this state may exercise jurisdiction on any basis not inconsistent with the constitution of this state or of the United States.

Due process requires that a nonresident defendant have minimum contacts with the forum state sufficient that exercise of personal jurisdiction does not offend notions of fair play and substantial justice. *International Shoe Co. v. Washington*, 66 S. Ct. 154, 158 (1945). *Id.* This constitu-

tional test may be satisfied by a showing either (1) that defendant's contacts with the forum are "substantial" or "continuous and systematic," *Decker Coal Co. v. Commonwealth Edison Co.,* 805 F.2d 834, 839 (9th Cir. 1986); or (2) that "there is a strong relationship between the quality of the defendant's forum contacts and the cause of action," *id.* (citing *Burger King v. Rudzewicz,* 105 S. Ct. 2174 (1985)). The burden of showing that jurisdiction is proper rests with the plaintiff. *Decker Coal,* 805 F.2d at 839; *Haisten v. Grass Valley Medical Reimbursement,* 784 F.2d 1393, 1397 (9th Cir. 1986).

Personal jurisdiction may be exercised over a foreign defendant under either one of two categories: general or specific. As the Court in *Spirits, Inc. v. Superior Court,* 104 Cal.App.3d 918, 923-24 (1980) (emphasis added) stated:

> If the non-resident's activities within California are extensive or wide-ranging or substantial, continuous and systematic, then *general jurisdiction* may be exercised as to all causes of action against the defendant, irrespective of whether the particular cause alleged has a direct connection with the defendant's activities within this state.
>
> If, however, the non-resident defendant's activities within this state are not so pervasive as to justify the exercise of general jurisdiction, then the quality and nature of defendant's activity within the state must be evaluated in relation to the particular cause of action alleged.

Three criteria are generally applied to determine the existence of specific or limited jurisdiction based upon minimum contacts:

> 1. The out-of-state defendant *purposefully directed [his] activities toward residents of the forum state* or otherwise established contacts with the forum state;

2. Plaintiff's *cause of action arises out of or results from the defendant's forum-related contacts*; and

3. The forum's exercise of personal jurisdiction in the particular case *must be reasonable.*

William W. Schwarzer, A. Wallace Tashima, and James M. Wagstaffe, California Practice Guide, Federal Civil Procedure Before Trial, ¶3:116.

2. *Contacts of the De Carbon Company with California.*

Defendants argue that there is no general jurisdiction over the De Carbon Company in California. They submit that the De Carbon Company has no offices, bank accounts, real property, employees, or customers in California; and that the company is managed and operated solely within France, by management and supervisory boards which meet and conduct business only in France. Under these circumstances, defendants argue that the De Carbon Company does not have the substantial, continuous or systematic contacts with this forum required for the exercise of general jurisdiction.

Defendants also contend that specific jurisdiction is lacking in this forum because plaintiffs' claims are wholly unrelated to De Carbon Company's froum-related activities. Defendants assert that plaintiffs do not and cannot allege that De Carbon Company performed any acts in California that give rise to or are even related to any of plaintiffs' sixteen causes of action.[6]

Plaintiffs make no argument that De Carbon Company's contacts with this forum are sufficient for the exercise of

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[6]At oral argument, plaintiffs presented evidence that there may have been a distributor of De Carbon shock absorbers in Hayward, California as recently as 1993. Even if this is so, this single contact would not change the outcome of the jurisdictional analysis. *See Asahi Metal Industry Co. v. Superior Court of California,* 480 U.S. 102 (1987).

general jurisdiction. However, plaintiffs do contend that the Company's contacts satisfy the requirements for the exercise of specific jurisdiction.

In order for the Court to exercise jurisdiction in a way which satisfies the requirements of due process, plaintiffs must show all of the following: (1) the De Carbon Company took some action through which it purposefully availed itself of the privilege of conducting business in California; (2) that plaintiffs' claims arise out of De Carbon Company's forum-related activities; and (3) that the exercise of jurisdiction over De Carbon Company is reasonable. *See Sher v. Johnson,* 911 F.2d 1357, 1361 (9th Cir. 1990). The requirement that plaintiffs' claims arise out of the De Carbon Company's activities in the forum is dispositive in this case.

Under *Ballard v. Savage,* 65 F.3d 1495, 1500 (9th Cir. 1995), plaintiffs must demonstrate that "but for" defendants' contacts with California, plaintiff's claims would not have arisen. On the issue of personal jurisdiction over De Carbon Company, the inquiry must be made only with regard to De Carbon Company's contacts with California. The other defendants' contracts must not be considered. The only California contact alleged is a distributor who sold De carbon shock absorbers in the state.

Plaintiffs make no specific allegations that any of their claims resulted directly from the sale of shock absorbers in California. Plaintiffs' claims primarily involve allegations that the GM defendants, along with certain directors officers and managers of De Carbon Company, devised schemes and conspired to take control of De Carbon Company and "loot" its corporate assets and technical know-how; and that the defendants attempted to create a monopoly in the United States monotube shock absorber market by squeezing out competing manufacturers including the De Carbon Company. These are broad allegations involving activities throughout France and the United States. However, none of

the allegations specifies that activities in California were the catalyst to the claims, and the complaint contains no suggestion that activities of the De Carbon Company in California form any part of the claim.

The jurisdictional analysis here is atypical, since plaintiffs, by bringing a shareholder derivative action, do not seek damages for wrongs committed by De Carbon Company, but instead name De Carbon Company as a nominal defendant in order press claims the company itself would not act upon. However, plaintiffs cite no authority for altering the jurisdictional analysis when dealing with the nominal defendant in a derivative action and the court believes itself bound by the analysis discussed above.

Accordingly, this Court finds that De Carbon Company is not subject to personal jurisdiction in this forum, and must be dismissed from this action. Moreover, upon dismissal of De Carbon Company as a defendant, the derivative action lacks an indispensable party under Rule 19 of the Federal Rules of Civil Procedure. *Ross v. Bernhard,* 396 U.S. 531, 538 (1970). Accordingly, defendants' motion to dismiss on this ground must be GRANTED.

C. *Remaining Motions.*

1. *Preliminary Injunction.*

Plaintiffs seek a preliminary injunction "enjoining defendants, their officers, agents, servants, employees, attorneys and all those in active concert or participation with them, from proceeding with the final acquisition of the remaining shares in (De Carbon Company) which are currently held by plaintiffs, in order to prevent an irreparable loss of rights prior to a full and fair trial on the merits of this action." (Pln. Mtn for Preliminary Inj., p. 1).

In light of the dismissal of the plaintiffs' claims, the Court does not reach the merits of plaintiffs' motion for preliminary injunction, and that motion is therefore DENIED.

2. *Forum Non Conveniens.*

Defendants also move for dismissal on grounds of forum non conveniens. In light of the above findings, the Court need not and does not reach this motion.

## CONCLUSION

For the above reasons and for good cause shown:

(1) Defendants' motion to dismiss pursuant to the Federal Arbitration Act is GRANTED, conditioned on the GM defendants' agreement, based on their representations to the Court, that they are subject to and will participate in ICC arbitration proceedings in France;

(2) Plaintiff's motion for preliminary injunction is DENIED;

(3) Defendant De Carbon Company's motion to dismiss for lack of personal jurisdiction is GRANTED; and

(4) The GM Defendants' motion to dismiss for failure to join an indispensable party is GRANTED.

IT IS SO ORDERED.

Dated: June 7, 1997.

/s/ SUSAN ILLSTON

SUSAN ILLSTON
United States District Judge

No. C-96-4670 SI

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF
CALIFORNIA

STEPHANE BOURCIER DE CARBON, et al.,
*Plaintiffs,*
v.
GENERAL MOTORS CORPORATION, et al.,
*Defendants.*

(Entered July 9, 1997)

**ORDER DENYING PLAINTIFF'S MOTION TO ALTER OR AMEND JUDGMENT**

Filed July 3, 1997
Richard W. Wieking
Clerk, U.S. District Court
Northern District of California

On June 9, 1997, this Court issued an Order dismissing this action in favor of arbitration pursuant to a contractual agreement by the parties. The Order also denied plaintiffs' motion for a preliminary injunction which sought to enjoin defendants from proceeding with the final acquisition of the remaining shares in the De Carbon Company currently held by plaintiffs. Plaintiffs sought the injunction to prevent the loss of their standing to bring derivative shareholder claims as part of this action.

On June 24, 1997, plaintiffs filed a motion to alter or amend the Court's judgment,[1] and Defendants' filed an opposition brief on June 27, 1997.

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[1]The Court will treat plaintiffs' request as a motion for reconsideration.

## DISCUSSION

Federal Rule of Civil Procedure 60(b) governs the reconsideration of final orders. That rule permits a district court to relieve a party from a final order or judgment on grounds of

> (1) mistake, inadvertence, surprise, or excusable neglect, (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b), (3) fraud . . . of an adverse party, . . . or (6) any other reason justifying relief from the operation of the judgment. The motion shall be made within a reasonable time, and for reasons (1), (2), and (3), not more than one year after the judgment, order, or proceeding was entered or taken.

Fed. R. Civ. P. 60(b).

Motions to reconsider are committed to the discretion of the trial court. *Combs v. Nick Garin Trucking,* 825 F.2d 437, 441 (D.C. Cir. 1987). To succeed in a motion to reconsider, a party must set forth facts or law of a strongly convincing nature to induce the Court to reverse its prior decision. *See, e.g., Kern-Tulare Water Dist. v. City of Bakersfield,* 634 F. Supp. 656, 665 (E.D. Cal. 1986), *aff'd in part and rev'd in part on other grounds,* 828 F.2d 514 (9th Cir. 1987), *cert. denied,* 486 U.S. 1015 (1988).

Two arguments are commonly used to justify the reconsideration of an order. The first is a clear error of law by the Court or the need to prevent a "manifest injustice" from occurring. In order for a party to demonstrate clear error, the moving party's arguments cannot be the same as those made earlier. *Backlund v. Barnhart,* 778 F.2d 1386, 1388 (9th Cir. 1985). If a party simply inadvertently failed to raise the arguments earlier, the arguments are deemed waived. *Publishers Resource, Inc. v. Walker-Davis Publications, Inc.,* 762 F.2d 557, 561 (7th Cir. 1985).

The second major ground for a motion for reconsideration is that a party has produced new evidence. In order for evidence to be considered "new" for the purposes of Rule 60(b), it must meet three criteria. First, it must be of such a character that it would change the outcome of the Court's prior decision. *Fernhoff v. Tahoe Regional Planning Agency,* 622 F.Supp. 121, 122 (D. Nev. 1985). Second, it must have been undiscovered at the time of Court's original decision. *Englehard Indus., Inc. v. Research Instrumental Corp.,* 324 F.2d 347, 352 (9th Cir. 1963), *cert. denied,* 377 U.S. 923 (1964). Third, it could not have been discovered through exercise of reasonable diligence by the moving party. *Shiley, Inc. v. Bentley Laboratories, Inc.,* 115 F.R.D. 169, 170 (C.D. Cal. 1987); *see* Fed. R. Civ. P. 60(b)(2). if the evidence was previously available, the motion fails as a matter of law. *Trentacosta v. Frontier Pac. Aircraft Indus., Inc.,* 813 F.2d 1553, 1557-58 n.4 (9th Cir. 1987).

Plaintiffs have made no compelling arguments of clear error or "manifest injustice" in the Order of Dismissal at issue here. Moreover, plaintiffs have not produced any new evidence or cases, and have essentially made the same arguments as were made in relation to the original motions heard and decided by this Court. Accordingly, plaintiffs' motion for reconsideration is hereby DENIED.

The denial of the motion for reconsideration notwithstanding, the Court is inclined to preserve the status quo as it relates to the remaining shares of De Carbon Company Stock, pending appeal of the dismissal order so as to prevent the loss of plaintiffs' standing to litigate derivative shareholder claims. Thus, the Court requests that the parties submit further briefing as to whether the status quo with respect to the remaining shares can or should be preserved. The parties should address:

1) whether a stipulation by the parties concerning the transfer of the remaining shares would be sufficient to

preserve plaintiffs' standing should this Court's ruling be reversed on appeal; and

2) if loss of standing can only be prevented through an injunction which prevents the transfer of plaintiffs' remaining shares pending appeal, what, if any, hardship such an injunction would cause defendants. The parties shall file the supplemental briefs addressing the issues listed above on or before July 10, 1997. In order to allow time to receive and review such briefing, the parties are ordered to continue to abide by the current agreement between them which prevents transfer of the block of remaining shares in the De Carbon Company for eight additional days, to and including July 18, 1997.[2]

## CONCLUSION

For the above reasons and for good cause shown:

1) Plaintiffs' motion for reconsideration is DENIED; and

2) The parties shall file supplemental briefs addressing the issues listed above; and

3) The parties are ORDERED to continue until July 18, 1997, to abide by the current agreement between them which prevents transfer of the block of remaining shares in the De Carbon Company.

IT IS SO ORDERED.

Dated: July 3, 1997.

/s/ SUSAN ILLSTON
SUSAN ILLSTON
United States District Judge

[2]This agreement, which was entered into after this Court's June 9, 1997 Order, currently prevents transfer of the shares until July 10, 1997.

No. 97-16523

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

STEPHANE BOURCIER DE CARBON; et al.,
*Plaintiffs-Appellants,*

VS.

GENERAL MOTORS CORPORATION,
a Delaware Corporation, et al.
*Defendants-Appellees.*

(Entered April 24, 1998)

**ORDER**

DC# CV 96-4670-SYI
Northern California

Filed Apr. 24, 1998
Cathy A. Catterson, Clerk
U.S. Court of Appeals

Before: BRUNETTI, RYMER and T.G. NELSON, Circuit Judges

Appellees' motion to dismiss this appeal for lack of jurisdiction is granted. *See* 9 U.S.C. § 16(b)(2); *McCarthy v. Providential Corp.*, 122 F.3d 1242, 1244-45 (9th Cir. 1997). Accordingly, the appeal is dismissed.

To the extent that appellants request that the court treat the notice of appeal as a petition for a writ of mandamus, the request is denied. *See Bauman v. United States District Court*, 577 F.2d 650, 654-55 (9th Cir. 1977).